FILE COPY

Supreme Court, U.S.
FILED
NOV 3 - 2006
OFFICE OF THE CLERK

No. 05-998

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v

JUAN RESENDIZ-PONCE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL REPLY BRIEF OF RESPONDENT

JEFFREY T. GREEN
DEVON A. CORNEAL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

ATMORE L. BAGGOT*
1615 North Delaware Drive
Apache Junction, AZ 85220-1804
(480) 983-9394

STEVEN F. HUBACHEK
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, CA 92101-5008
(619) 234-8467

Counsel for Respondent

November 3, 2006

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
THE INDICTMENT IS FATALLY DEFECTIVE FOR FAILURE TO ALLEGE A SUBSTANTIAL STEP AND TO DESCEND TO ITS PARTICULARS	1
I. LIKE *RUSSELL*, THE INDICTMENT HERE FAILS TO PROVIDE ADEQUATE NOTICE OF A CRUCIAL FACTUAL ISSUE, RATHER THEN MERELY OMITTING A LEGAL TEST, AS IN *HAMLING*	3
II. THE INDICTMENT VIOLATES RESPONDENT'S RIGHT TO BE PROSECUTED ONLY ON FACTS FOUND BY THE GRAND JURY, AN ISSUE NOT RAISED IN *HAMLING*	4
A. The Screening Function Is Compromised Because The Indictment Does Not Clearly State That The Grand Jury Found That Respondent Committed A Substantial Step	5
B. The Indictment Fails To Descend To Particulars	6
CONCLUSION	10

TABLE OF AUTHORITIES

CASES

	Page
Bannon v. United States, 156 U.S. 464 (1895)	4
Capone v. United States, 56 F.2d 927 (7th Cir. 1932)	8
Cochran v. United States, 157 U.S. 286 (1895)	7
Costello v. United States, 350 U.S. 359 (1956)	6
Hagner v. United States, 285 U.S. 427 (1932)	8
Hamling v. United States, 418 U.S. 87 (1974)	3, 4
Russell v. United States, 369 U.S. 749 (1962)	*passim*
Schmuck v. United States, 489 U.S. 705 (1989)	9
Stirone v. United States, 361 U.S. 212 (1960)	5
United States v. Britton, 107 U.S. 655 (1883)	7
United States v. Carll, 105 U.S. 611 (1881)	2, 6
United States v. Cruikshank, 92 U.S. 542 (1875)	6
United States v. Gordon, 780 F.2d 1165 (5th Cir. 1986)	7
United States v. Heng Awkak Roman, 356 F. Supp. 434 (S.D.N.Y.), *aff'd*, 484 F.2d 1271 (2d Cir. 1973)	9
United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974)	6
United States v. Miller, 471 U.S. 130 (1985)	5
United States v. Morales-Palacios, 369 F.3d 442 (5th Cir.), *cert. denied*, 543 U.S. 825 (2004)	6
United States v. Pirro, 212 F.3d 86 (1st Cir. 2000)	7
United States v. Resendiz-Ponce, 425 F.3d 729 (9th Cir. 2005), *cert. granted*, 126 S. Ct. 1776 (2006)	4, 5
United States v. Rodriguez, 416 F.3d 123 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1142 (2006)	6

SCHOLARLY AUTHORITY

2 Wayne R. LaFave, *Substantive Criminal Law* (2d ed. 2003)	9

THE INDICTMENT IS FATALLY DEFECTIVE FOR FAILURE TO ALLEGE A SUBSTANTIAL STEP AND TO DESCEND TO ITS PARTICULARS

Petitioner concedes that "the Grand Jury Clause requires that every element of a criminal offense be charged in a federal indictment" in order "to ensure that the grand jury has considered all of the elements of the offense before deciding to indict." U.S. Supp. Br. at 3. The lower courts have made clear that a substantial step is an element of an attempt offense and Petitioner acknowledges that a "a substantial step toward the completion of the offense" is required under the statute. *Id.* at 8. Despite this acknowledged requirement, Petitioner contends first that a substantial step is not a separate element and second that, on its view, the generic allegation of attempt so obviously subsumes the substantial step requirement that it need not be stated. These contentions cannot be squared with the law of attempt and this Court's precedents.

Petitioner's supplemental brief ignores a fundamental, constitutional ruling of this Court – where an indictment "'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must also state the species, – it must descend to particulars.'" *Russell v. United States*, 369 U.S. 749, 765 (1962) (quoting *United States v. Cruikshank*, 92 U.S. 542, 558 (1875)). As demonstrated by the arguments and additional authorities cited in Respondent's Supplemental Brief (at 5-8, 12), this rule applies to attempt crimes especially because of their inchoate nature and the danger that a prosecution will result from acts that are not unlawful or intentions that are not evil. Petitioner does not contest that the term "attempt" is generic or that that the crime is inchoate, rather, Petitioner seems to argue for creation of a new constituent of a criminal offense, not an "element" that must be alleged in an indictment, but an "ingredient[]," U.S. Supp. Br. at 4, that may be "subsumed" in another allegation

but that still must be found by the petit jury. *Id.* at 8. But this novel argument, which is nowhere supported by authority in Petitioner's brief, is entirely circular in that it would excuse the specification of "term of art" elements from an indictment solely because they are "terms of art."

The argument is fatally flawed for two additional reasons. First, Petitioner's argument is directed to the wrong audience. That "attempt" may be a term of art with a definite meaning for counsel is of no moment to grand jurors who exercise a screening function and who must find probable cause for "all the elements necessary to constitute the offense intended to be punished." *United States v. Cruikshank*, 105 U.S. 611, 612 (1881) (noting also that "it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, *directly, and expressly*, without any uncertainty or ambiguity, set forth all the elements") (emphasis added). Lay grand jurors cannot be expected to "supply the requisite components of that element," U.S. Supp. Br. at 7, and Petitioner's argument would therefore dispense altogether with a robust screening function for the grand jury. Second, Petitioner's argument proves too much. In any case where a legal term of art with a definite meaning appeared in the statute at issue, Petitioner's logic would not require an indictment to allege elements that are somehow "subsumed" within the term of art. Such a rule would upset settled law on indictments and risk creating differing standards in the courts as to what "ingredients" or "elements" are fairly subsumed within a "term of art with definite meaning." Thus, on Petitioner's view, an indictment for conspiracy would require no allegations of overt act (even if an element), or manner and means. Nor would a burglary indictment require an allegation of unlawful entry with an intent to commit a felony therein. Such shorthand for lawyers cannot sensibly be foisted upon grand jurors. Thus, both the appraisal and screening functions of the Grand Jury Clause are compromised by Petitioner's approach.

I. LIKE *RUSSELL*, THE INDICTMENT HERE FAILS TO PROVIDE ADEQUATE NOTICE OF A CRUCIAL FACTUAL ISSUE, RATHER THEN MERELY OMITTING A LEGAL TEST, AS IN *HAMLING*.

Petitioner relies upon *Hamling v. United States*, 418 U.S. 87 (1974), in an effort to distinguish *Russell* and *Cruikshank*. However, the *Hamling* defendants attacked only the notice provided by the indictment;[1] they did not argue that the indictment created the risk that they might be "convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted [them]." *See Russell*, 369 U.S. at 770. Thus, *Hamling* does not speak to Respondent's arguments based upon that portion of *Russell*'s holding.

Further, *Hamling* distinguished *Russell*'s holding as to generic allegations by pointing out that the challenged portion of the *Hamling* indictment involved a legal definition, not a generic term with a factual component. See *Hamling*, 418 U.S. at 118 ("The definition of obscenity, however, is not a question of fact, but one of law; the word 'obscene,' as used in 18 U.S.C. § 1461, is not merely a generic term, but a legal term of art.") The notice issues in *Russell* and *Hamling*, however, differed starkly. The *Russell* defendants knew that the prosecution contended that they had refused to give testimony pertinent to a question under Congressional committee inquiry, but they did not know what the question was. *See Russell*, 369 U.S. at 752-53. Under those circumstances, a grand jury, in making the "ultimate determination" whether to indict, "must necessarily determine what the question under inquiry was." *Id.* at 770. Because the *Russell* defendants lacked notice of that "ultimate

---

[1] *See Hamling*, 418 U.S. at 117 ("Petitioners attack the sufficiency of the indictment [because it] failed to give them adequate notice of the charges against them.").

determination," the indictments "violat[ed] the basic principle 'that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him '" *Id.* at 766 (quoting *United States v. Simmons*, 96 U.S. 360, 362 (1877))

> A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest upon one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture

Id. Violation of that "basic principle" thus implicates fundamental constitutional rights.

The indictment here implicates the same "basic principle" violated in *Russell*. It not only fails to specify the substantial step it fails to allege one at all. The substantial step is "the conduct element of the offense of attempted unlawful reentry," *see* U.S. Supp. Br. at 8, it ensures that "a party cannot be punished for an evil design, unless he has taken some steps towards carrying it out." *See Bannon v. United States*, 156 U.S. 464, 469 (1895). By failing to allege it, the indictment leaves "the chief issue" – the "conduct element" – undefined. *See United States v. Resendiz-Ponce*, 425 F.3d 729, 733 (9th Cir. 2005) ("a substantial step toward [the] underlying offense is at the very core of an attempt charge"). The error here thus implicates the apprisal function in a way that the omission of a "legal definition of obscenity [that] does not change with each indictment," *see Hamling*, 418 U.S. at 118-19, does not.

II. THE INDICTMENT VIOLATES RESPONDENT'S RIGHT TO BE PROSECUTED ONLY ON FACTS FOUND BY THE GRAND JURY, AN ISSUE NOT RAISED IN *HAMLING*.

As Petitioner acknowledges, U.S. Supp. Br. at 11-12, the Grand Jury Clause does not merely encompass the notice

issues raised in *Hamling*. It also provides a guarantee that a defendant will be prosecuted only on facts found by a grand jury, a right squarely addressed in *Russell*, but not in *Hamling*. That right alone justifies the Court of Appeals' holding here. *Russell* held that

> [t]o allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the ... grand jury was designed to secure. For a defendant could then be convicted on the basis of acts not found by, and perhaps not even presented to, the grand jury which indicted him.

369 U.S. at 770. *Accord Stirone v. United States*, 361 U.S. 212, 217 (1960) (the defendant enjoys a "substantial right to be tried only on charges presented in an indictment returned by a grand jury"). *See also United States v. Miller*, 471 U.S. 130, 140 (1985) (adopting the analyses in *Stirone* and *Russell*). The Court of Appeals adopted *Russell*'s analysis, describing "the basic institutional purpose of the grand jury" as "ensuring" that a defendant is not convicted except upon facts found by a grand jury. *See Resendiz-Ponce*, 425 F.3d at 732. *See also id.* at 733 ("The defendant ... has a right to have a grand jury consider whether to charge that specific overt act."). Because the indictment did not allege a substantial step, the Court of Appeals properly held that the indictment failed to accomplish that "basic institutional" purpose. *See id.* at 732.

A. The Screening Function Is Compromised Because The Indictment Does Not Clearly State That The Grand Jury Found That Respondent Committed A Substantial Step.

The indictment here does not allege a substantial step; it merely alleges that Respondent attempted to reenter. Yet there is no dispute that the screening function of the Grand

Jury Clause "ensure[s] that the grand jury has considered all of the elements of the offense before deciding to indict." U.S. Supp. Br. at 3. The words of a statute do not meet this screening purpose unless they clearly and unambiguously set forth the necessary elements of the offense. *Carll*, 105 U.S. at 612. The indictment here certainly does not expressly allege a substantial step. Indeed, Petitioner has never contended that the grand jurors that indicted Respondent were advised of the common law – or generic – meaning of the term "attempt."[2] It is difficult to believe that the grand jury, which throughout its history has functioned as a group of "lay[persons who] conduct their inquiries unfettered by technical rules," *Costello v United States*, 350 U.S. 359, 364 (1956), is so familiar with common law terminology as to necessarily have meant that "the defendant must have engaged in conduct which constitutes a substantial step toward the commission of the crime [that was] strongly corroborative of the firmness of the defendant's criminal intent," see *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974), when it charged an attempt.

B. The Indictment Fails To Descend To Particulars.

But it is not enough that that an indictment state that a defendant engaged in a substantial step – the indictment must be specific, it must "descend to particulars," *United States v Cruikshank*, 92 U.S. 542, 558 (1875); *Russell*, 369 U.S. at 765, in order to satisfy both the notice and screening functions of the Grand Jury Clause. This specificity, which

---

[2] Two courts believe that Congress meant something other than the "'definite . . meaning'" of the "term of art" at issue, "'attempt.'" *See United States v. Rodriguez*, 416 F.3d 123, 126 (2d Cir. 2005), *cert. denied*, 126 S.Ct. 1142 (2006); *United States v. Morales-Palacios*, 369 F.3d 442, 447 (5th Cir.), *cert. denied*, 543 U.S. 825 (2004). Respondent believes those cases are wrongly decided, but demonstrate that the inference that the Solicitor General wishes to draw, that the grand jurors necessarily found a substantial step because "attempt" is well-defined, is unwarranted because there are competing meanings of the term.

requires more than simply parroting generic statutory or common law terms, has "retain[ed] [its] full vitality under modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure." *Russell*, 369 U.S. at 766. Thus, observance of a rigorous standard for indictments is neither an outdated concept nor a prejudicial burden; it is adherence to a constitutional requirement. "An indictment that fails to allege the essential elements of the crime charged offends both the Fifth and Sixth Amendments." *United States v. Pirro*, 212 F.3d 86, 92 (1st Cir. 2000).

Under this rubric, it is clear that the prosecution "need not include *all* of the facts that the government intends to prove at trial" in an indictment. U.S. Supp. Br. at 12. Respondent asserts his "constitutional *right* to know [the substantial step(s)] with which he is charged" rather than his "*need* to know the evidentiary details establishing [that element]." *See United States v. Gordon*, 780 F.2d 1165, 1172 (5th Cir. 1986). However, being relieved of the burden of setting forth its case-in-chief in an indictment is a far cry from freeing the prosecution from providing factual information "sufficient[] [to] apprise[] the defendant of what he must be prepared to meet," *Cochran v. United States*, 157 U.S. 286, 290 (1895), and ensuring that he will be tried only on facts found by the grand jury, *Russell*, 369 U.S. at 770. Although this Court has cautioned against "carry[ing] refinement in a criminal pleading to an impracticable extent," *United States v. Britton*, 107 U.S. 655, 663 (1883), requiring that the prosecution specify the substantial step a defendant is alleged to have taken in his attempt to commit a crime is far from impracticable.

Where the prosecution has evidence of a substantial step, as here, it is not onerous to include it in the indictment. Indeed, in the instant case, the indictment could be made constitutionally sufficient with the addition of a mere seven words. Rather than an indictment which states only that "On

on about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona ...," JA at 8, an indictment which properly sets forth both intent and substantial step need only state "On or about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, *by tendering false identification to immigration officers* ..." In this way, the District Court would have had assurance that the grand jury performed its constitutionally mandated screening function by having before it all of the essential elements, *see Hagner v. United States*, 285 U.S. 427, 431 (1932) (the indictment must "contain[] the elements of the offense"), and Respondent would have been apprised that the substantial step the prosecution intended to prove was using a phony identification, rather than physically crossing the border or lying to officers. This constitutional obligation is neither an onerous nor prejudicial burden for prosecutors.

Perhaps because of the ease with which it could have met its constitutional obligations, Petitioner sidesteps the issue of the indictment's insufficiency by focusing on what Respondent later knew of the facts, asserting Respondent "had sufficient notice of the factual evidence that the government possessed of his attempted reentry" because that evidence was disclosed in discovery. U.S. Supp. Br. at 14-15. However, at issue is the sufficiency of the indictment and the notice Respondent had *when the indictment was handed down*, not the ultimate disclosure of the factual predicates of the prosecution's case. Later notice of facts or charges that were constitutionally required to be contained within the indictment, whether obtained through a bill of particulars or discovery, cannot save an invalid indictment. *See Russell*, 369 U.S. at 770. Thus, to the extent that Petitioner relies on *Capone v. United States*, 56 F.2d 927, 931 (7th Cir. 1932), for the proposition that any harm to a defendant arising from

excessive generality in an indictment can be cured by a bill of particulars, U.S Supp. Br. at 16-17, it runs afoul of *Russell*

Petitioner also suggests that requiring compliance with the constitutional requirement that each element, including a substantial step, be alleged will create "some tension" with Fed. R. Crim. P. 31(c) *See* U.S. Supp. Br. at 10 n.7, 17-18. The Court has already held that Rule 31 must be interpreted consistently with the Grand Jury Clause *See Schmuck v. United States*, 489 U.S. 705, 717 (1989) ("a defendant cannot be held to answer a charge not contained in the indictment brought against him") Thus, indiscriminate application of Rule 31(c) to attempt offenses would raise significant constitutional issues in cases where the *mens rea* element differs in the substantive and attempt offenses *Cf.* 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.3(a), at 212-13 n.18 (2d ed. 2003) (noting that for some offenses, "intent will be necessary as to the attempt even if unnecessary as to the completed crime") At any rate, assuming identity of *mens rea*, the Rule's most natural application is to offenses where the defendant has done all that he could to commit the offense yet failed to commit it due to circumstances beyond his control *See, e.g., United States v. Heng Awkak Roman*, 356 F. Supp. 434, 436-37 & n.4 (S.D.N.Y.) (finding defendants guilty, under Fed. R. Crim. P. 31, of attempted possession of heroin where defendants took possession of a suitcase containing soap powder, not heroin, "where the defendants' actions would have constituted the completed crime if the surrounding circumstances were as they believed them to be"), *aff'd*, 484 F.2d 1271 (2d Cir. 1973) In such circumstances, the grand jury's finding that the defendant committed the offense (necessarily made in indicting on the completed offense) subsumes the substantial step of doing everything necessary from the defendants' perspective

Ultimately, although the prosecution's indictment gave Respondent notice that he was charged with attempted reentry, he was never provided constitutionally sufficient

notice of the essential elements of that crime – in other words, he was not apprised of the substantial step that the prosecution would attempt to prove and against which he would have to defend. Nor was Respondent protected against being tried on facts not found by the grand jury.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

JEFFREY T. GREEN
DEVON A. CORNEAL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

ATMORE L. BAGGOT*
1615 North Delaware Drive
Apache Junction, AZ 85220-1804
(480) 983-9394

STEVEN F. HUBACHEK
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, CA 92101-5008
(619) 234-8467

Counsel for Respondent

November 3, 2006

* Counsel of Record